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In the Supreme Court of the United States

OCTOBER TERM, 1978

WESTERN WATERPROOFING CO., INC., PETITIONER

v.

RAY MARSHALL, SECRETARY OF LABOR

and

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 576 F.2d 139. The opinion of the Occupational Safety and Health Review Commission (Pet. App. A12-A25) is reported at 1977-1978 CCH Occup. Safety & Health Dec. ¶ 21,572. The opinion of the administrative law judge (Pet. App. A26-A54) is reported at 1975-1976 CCH Occup. Safety & Health Dec. ¶ 19,925.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1978. A timely petition for rehearing was denied on June 2, 1978. The petition for a writ of certiorari was filed on August 31, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence adequately established that petitioner "willfully" violated safety standards promulgated under the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*

STATEMENT

Petitioner is a construction company. It was visited by two compliance officers of the Occupational Safety and Health Administration, who observed petitioner's employees working on several two-point suspension scaffolds, at heights ranging from 17 to 47 feet above the ground, in the course of sandblasting a building (Pet. App. A3, A13, A30-A31). The scaffolds were equipped with a guardrail only on the platform edge facing away from the building, and they had no toeboards on any of the sides. The scaffolds were not lashed to the building, and the employees working from these scaffolds were not using safety belts. No lifelines had been rigged (Pet. App. A3). Petitioner was cited for willfully violating scaffolding standards (see Pet. App. A58-A59) concerning guardrails and toeboards, safety belts and lifelines, and lashing.

It is undisputed that petitioner's management personnel were aware of the three OSHA standards involved in this case, because the standards had been brought to the company's attention in earlier inspections.[1] But petitioner made a conscious and deliberate decision not to comply with the standards (Pet. App. A7, A10-A11, A14, A17-A20, A51-A52). It decided not to install toeboards on its scaffolds because it concluded that objects were unlikely to fall from the scaffolds and cause injury, but that unwanted sand could accumulate on the scaffold platforms if toeboards were used (*id.* at A4). Petitioner did not lash the scaffolds to the building because it believed that the rigging was tight enough to avoid excessive sway without lashing (*id.* at A7, A14). And the foreman at the worksite knew that safety belts and lifelines were required to be rigged, but he "was too busy and * * * just didn't do it" (*id.* at A10, A15).

The administrative law judge imposed a penalty of $9,000 for these violations (Pet. App. A26-A54). The Occupational Safety and Health Review Commission (OSHRC) granted review and held that petitioner had willfully violated safety standards (Pet. App. A12-A25).

The court of appeals agreed with OSHRC that the violations of the Act were willful. It saw no reason

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[1] The petitioner previously had been cited for failure to follow standards with respect to guardrails and toeboards and for having an employee on the same type of scaffold whose lifeline was not attached. These citations followed a fatal accident (Pet. App. A10, A51).

to pass on petitioner's argument that its scaffolds were safe despite its failure to observe the requirements of the regulations, because petitioner's "management personnel were well aware of the scaffolding standards for which they were cited. [Petitioner's] officials substituted their own judgment for the provisions of the standards and therefore cannot escape the conclusion that they acted voluntarily with either intentional disregard of, or plain indifference to, the requirements of the Act" (Pet. App. A7; footnote omitted).[2]

ARGUMENT

Petitioner argues that its violations of the safety standards were not willful because, although it knowingly did not observe the standards, it took other precautions that produced an equivalent degree of safety. This contention misses the point. Petitioner was charged with violating particular standards. The proceedings in such a case do not allow the firm to litigate whether the standards are necessary to safe operation or whether some other method of providing safe working conditions is available. The litigation in these cases is supposed to be quick and simple: it asks only whether the firm violated the standards

[2] The court remanded the case to the Commission, however, because it had relied on a provision of the safety regulations that had not been part of the initial charge or the administrative law judge's decision (Pet. App. A7-A9). The court concluded that the Commission should reconsider its penalty in light of the holding that the reliance on the regulation was improper.

and, if so, whether the violation was willful. Despite petitioner's attempt to cast their arguments about their motivations into the mold of a dispute about willfulness, they will not fit. There is nothing here but the argument that petitioner's scaffolds, although known by petitioner to be out of compliance with the standards, were safe anyway. The court of appeals properly rejected petitioner's reliance on such an argument.

At all events, petitioner's argument that proof of "obstinate refusal" to comply with the regulations is essential to a demonstration of willfulness (Pet. 6-7, 9) is wrong. The court of appeals' construction of willfulness as including "intentional disregard of, or plain indifference to" the standards (Pet. App. A7)[3] comports with the usual meaning of the term in regulatory statutes that impose civil penalties. It is generally adequate to show intentional disregard of or indifference to the regulatory requirement, and it is not necessary to establish evil intent or malicious purpose. See *United States* v. *Illinois Central R.R.*, 303 U.S. 239, 242-243 (1938); cf. *United States* v. *Pomponio*, 429 U.S. 10 (1976); *United States* v. *Bishop*, 412 U.S. 346, 361 (1973).

[3] The court followed the interpretation of "willful" adopted by OSHRC and the Secretary of Labor: "an act done voluntarily with either an intentional disregard of, or plain indifference to, the Act's requirements." See *General Electric Co.*, 1977-1978 CCH Occup. Safety & Health Dec. ¶ 21,853 (May 19, 1977). As the court of appeals correctly observed (Pet. App. A5), this interpretation by the agency charged with the statute's administration is entitled to great deference. *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

Any other interpretation would seriously impair the operation of the Act. If petitioner were correct, the significant penalties reserved by the Act for willful violations[4] would rarely be imposed, since employers would be free unilaterally to conclude that their safety measures equalled those required by the agency.[5] This would defeat the purpose of the Act of entrusting safety determinations not to the employer but to a regulatory agency.[6]

The court of appeals' decision follows those of four other circuits that have considered the question. *Empire-Detroit Steel Division* v. *OSHRC*, 579 F.2d 378 (6th Cir. 1978); *Intercounty Construction Co.* v. *OSHRC*, 522 F.2d 777 (4th Cir. 1975), cert. denied, 423 U.S. 1072 (1976); *United States* v. *Dye Construction Co.*, 510 F.2d 78 (10th Cir. 1975); *F. X. Messina Construction Corp.* v. *OSHRC*, 505

[4] Compare 29 U.S.C. 666(a) ($10,000 civil penalty for willful violation) with 29 U.S.C. 666(b), (c) ($1,000 penalty for "serious" and "non-serious" violations).

[5] The Act established orderly procedures for issuance of variances in situations where the employer demonstrates that it can satisfy the purpose of the statute by other means. 29 U.S.C. 655(d).

[6] Petitioner argues that "willful" must be defined restrictively to avoid overlapping with the definition of a "serious violation" (see 29 U.S.C. 666(a), (b), (j)). But "serious" violations are defined in terms of risk of serious injury, 29 U.S.C. 666(j). Willfulness, to the contrary, focuses on actual knowledge and voluntary disobedience. In other words, "willfulness" concerns the employer's state of mind, while the "serious violation" definition addresses the potential consequences of noncompliance.

F.2d 701 (1st Cir. 1974). Petitioner argues, however, that it conflicts with *Frank Irey, Jr., Inc.* v. *OSHRC*, 519 F.2d 1200 (3d Cir. 1974), adhered to en banc, 519 F.2d 1215 (1975), aff'd on other grounds, 430 U.S. 442 (1976), which stated that "[w]illfulness connotes defiance or such reckless disregard of consequences as to be equivalent to a knowing, conscious, and deliberate flaunting [flouting] of the Act." 519 F.2d at 1207.

The statement in *Irey* is wrong under this Court's subsequent decision in *Pomponio*.[7] It would be premature to grant review in the absence of some reason to believe that the Third Circuit will adhere to its view. Moreover, the language used in *Irey* was dicta. The case involved a foreman's good faith mistake regarding soil composition of a trench in which employees were working. If his mistaken assumption had been correct, the trench would not have been dangerous, and the standards would not have required shoring against collapse. 519 F.2d at 1206-1207. The Third Circuit was not considering a case of intentional disobedience to a known standard. In *Irey* itself the court did not hold that the violation was not willful as a matter of law; it remanded the case to OSHRC for reconsideration. The present case is quite unlike *Irey*. Petitioner does not claim a good-

[7] *Pomponio* held that willfulness, even in a criminal case, means only "an intentional violation of a known legal duty" (429 U.S. at 12) and does not include any element of bad purpose or evil motive. The definition of willfulness in a civil case is still less strict. *United States* v. *Illinois Central R.R.*, *supra* (willful is simply the opposite of unwitting).

faith mistake of fact, and indeed both OSHRC and the court of appeals held that petitioner knew it was violating applicable regulations. Despite the language it used in *Irey*, we think it likely that the Third Circuit would affirm a finding of willfulness in a case similar to the present one.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8] OSHRC stated that "the [safety belt] violation was willful, even under the [*Irey*] test * * *" (Pet. App. A18). The court of appeals noted that the foreman's actions were "inexcusable in this case" (Pet. App. A11). Application of the *Irey* test thus would not assist petitioner.

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